United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,025

AVON W. BURKE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment of
Conviction in the United States
District Court for the District of Columbia

HERBERT A. BERGSON
DONALD L. HARDISON
Bergson & Borkland
888 17th Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Did the trial court err in instructing the jury over the objection of defense counsel that it could consider as evidence of appellant's guilt the alleged fact that he fled from the scene after the arresting officer saw him display a dangerous weapon to a companion?

2. If some form of flight instruction was permissible, did the court err in failing to caution the jury that evidence of flight was fully consistent with innocence in the circumstances of this case where the officer who accosted appellant in the street was not in uniform and did not otherwise identify himself?

3. Was it error for the district court in a special cautionary instruction to single out appellant's interest in the outcome of the trial as a matter affecting his credibility as a witness?

4. Should the district court have granted a continuance when it appeared that a subpoenaed but unserved and unfound defense witness would have testified that appellant did not have a gun in his possession in the washroom where appellant was subsequently arrested and where a gun was found in a nearby trash barrel?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for carrying a dangerous weapon entered by the United States District Court for the District of Columbia on April 21, 1967 pursuant to a jury verdict of guilty rendered on March 21, 1967. Appellant was sentenced to imprisonment for a period of one to three years. His application for leave to proceed on appeal without prepayment of costs was granted by the district court

on April 28, 1967. Jurisdiction to decide this appeal is vested in this Court by virtue of Sections 1291, 1294 and 1915 of Title 28 of the U.S. Code (28 U.S.C. 1291, 1294, 1915).

STATEMENT OF THE CASE

Returned on December 28, 1966 and filed in open court on January 16, 1967, the indictment charged that on or about December 2, 1966, appellant carried "openly and [sic] concealed on or about his person" a dangerous weapon without a license in violation of 22 D.C. Code 3204. Trial was held on March 21, 1967 before Judge Robinson and a jury, and on the same day the jury returned its verdict of guilty as charged (Tr. 157).

The Government's principal witness was a police officer who on December 2, 1966 at approximately twelve noon was waiting for his car to be repaired at a service station at the corner of Rhode Island Avenue and Fifth Street, N.E. (Tr. 21). Scheduled to go on duty that afternoon at five o'clock, the officer was not in uniform (Tr. 22). Although he was wearing his police trousers, they were at least partially obscured by a slip-over jacket; the officer was not wearing his police hat (Tr. 22).

The officer testified that while standing inside the station looking out of the window, he observed the appellant and a companion approaching the service station, with the appellant between the officer and appellant's companion (Tr.23).

As the officer stood watching, he saw appellant reach through his coat with his right hand (Tr. 37) and remove a shiny object from his right rear pocket which appellant displayed for a period of some six seconds to his companion (Tr. 23, 36). From the time the officer first observed appellant until the time he allegedly saw appellant remove the object from his pocket, a period of no more than 15 seconds elapsed (Tr. 36).

On the basis of his hobby of collecting guns, as well as his experience with his own service revolver (Tr. 36), the officer identified the object in appellant's hand as a chrome-plated, black-handled revolver (Tr. 23, 36). After seeing appellant show the revolver to his friend, the officer went outside and ordered appellant to stop (Tr. 23). The officer testified that when commanded to halt appellant turned and began to run across the street in the direction of the American Wholesalers building on Fifth Street in which, it subsequently developed, appellant worked (Tr. 23, 58). Taking chase, the officer momentarily lost sight of appellant behind some trucks which were unloading at a deck in front of the American Wholesalers building (Tr. 23, 38). The officer then entered the building and after a search of some ten minutes (Tr. 39) found appellant, accompanied by two other men, in a washroom on the second floor (Tr. 24-25). After searching appellant for the

revolver (Tr. 25) and being unable to find it on his person, the officer searched the washroom and later discovered in a nearby trash can a chrome-plated revolver similar to the one he thought he saw in appellant's possession on the street (Tr. 26). The gun allegedly had been thrown on top of some used paper towels in the approximately half-filled barrel (Tr. 26).

The appellant took the stand to testify in his own behalf. He stated that on the day and at the time in question he was approaching the service station with one Horace Collins, a fellow employee at the American Wholesalers Company (Tr. 58-59) with whom he was returning to their place of employment from a nearby store (Tr. 61). Appellant denied that he had a weapon or fire arm of any description in his possession (Tr. 63). He did not see any such weapon in the possession of Mr. Collins (Tr. 64) and the first time he saw the arresting officer was when the latter burst into the washroom on the second floor of the American Wholesalers building (Tr. 63, 65).

On cross-examination, appellant testified that he did not hear the arresting officer or anyone else "yell" or otherwise call out either to him or to Mr. Collins as the two walked along the street in front of the service station (Tr. 72). He further denied that he ran across the street (Tr. 73).

Appellant called Mr. Collins to the stand as a witness for the defense. Mr. Collins admitted that he was walking

with the appellant near the service station at approximately ten minutes past noon on the day in question (Tr. 88-89). He specifically denied, however, that appellant had a gun or any other object in his hand (Tr. 89, 104). Mr. Collins did not see the arresting officer on the street or in the service station and did not hear anyone call out to "stop" (Tr. 90).[1/] He stated that he and appellant crossed the street together; while neither ran across the street, both were walking fast, the witness because of the cold weather and his light clothing (Tr. 99), and the appellant because of his hurry to pick up a pay check before the pay office closed (Tr. 94-95). After crossing the street together, appellant and the witness parted, with appellant entering the regular employees' entrance and the witness going in through the door to the shipping department (Tr. 89-90).

Appellant also wanted to call as a witness for the defense one of the two men who were present in the washroom at the time of the arrest (Tr. 3), and, in fact, this witness, identified as one Bobby Adams, had been subpoenaed (Tr. 3, 60). While

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1/ The trial judge directed the arresting officer to stand in court (Tr. 109), at which point he specifically asked the witness if he saw "that officer out on the street before he came into American Wholesalers?" The witness answered (Tr. 110): "I didn't see him."

appellant, who had been released on his own recognizance pending trial, had attempted to locate and serve Mr. Adams with the subpoena, the witness apparently was no longer employed by the American Wholesalers Company. In any event, he had not been located before the trial date (Tr. 3). The identity of the other person who was present in the washroom was not known either to appellant (Tr. 60) or to the police (Tr. 41).

Appellant's proffer of testimony showed that the missing witness would have testified that appellant did not have possession of the gun while the witness was in the washroom (Tr. 4). Concluding that the defendant would not be prejudiced by the absence of the witness, the trial court did not grant a continuance, and the trial proceeded (Tr. 5).

Over the objection of defense counsel (Tr. 113-114), the district court in its final charge instructed the jury (Tr. 151) that it "could consider evidence of flight or concealment as tending to prove the defendant's consciousness of guilt." The court also charged that since the defendant had "a vital interest in the outcome of this trial" (Tr. 151), the jury could consider this factor in weighing his testimony. After brief deliberations, the jury returned its verdict of guilty as charged (Tr. 156).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Subsection (b) of Rule 52 of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. No flight and concealment instruction should be given in a case where the alleged flight was prompted by the command to "halt" of an off-duty, non-uniformed, and otherwise unidentified police officer.

2. If a flight and concealment instruction is otherwise proper, the trial court should carefully warn the jury that such evidence is consistent with innocence and does not necessarily reflect either actual guilt or even a consciousness of guilt.

3. An instruction which emphasizes the interest of an accused person in the outcome of his trial substantially deters a defendant from taking the stand in his own behalf and seriously interfers with his constitutional right to present testimony.

4. A continuance should be granted by a trial court on its own motion when an indigent defendant has obtained, but has been unable to serve, a subpoena for a material witness whose testimony is the only evidence available to refute a crucial part of the Government's proof.

SUMMARY OF ARGUMENT

1. The principal direct evidence tending to sustain the charge in this case of carrying a dangerous weapon was the testimony of the arresting officer that he had a brief view of an object cupped in the palm of appellant's hand which on the basis of his hobby of gun collecting the officer was able to identify as a revolver. Apparently doubting the sufficiency of this direct evidence, the prosecution relied extensively on the circumstance that appellant allegedly fled across the street and disappeared into a building when the officer called out to "halt." At the time in question, however, the arresting officer was off duty, was not in uniform, and did not otherwise identify himself. In these circumstances it was erroneous for the trial judge, over the objection of defense counsel, to

charge the jury that it could consider the alleged flight as reflecting appellant's consciousness of guilt. Even if appellant did flee when accosted by the officer, that fact would be irrelevant here since appellant had no duty to stop or otherwise respond to the command of what appeared to be a total stranger, and it was error to solemnize this evidence during the final charge.

The courts have consistently cautioned that there are so many reasons for flight fully consistent with innocence that such evidence scarcely comes up to the standards of proof tending to establish guilt. See, e.g., Alberty v. United States, 162 U.S. 499, at 510 (1896); Miller v. United States, 116 U.S. App. D.C. 45, 320 F. 2d 767 (1963). While the courts have generally approved the admissibility of evidence of flight as a circumstance to be considered with other proof, they have done so only on the supposition that such evidence will be treated by the trial courts with that "caution and circumspection which [its] inconclusiveness when standing alone requires" (Hickory v. United States, 160 U.S. 408, at 417 (1896)). Thus, even if evidence of appellant's alleged flight in this case was admissible, it was improper to single out this evidence during the solemnity of the final charge at least without clearly warning that appellant's alleged flight did not necessarily reflect feelings of guilt, and that feelings of guilt

do not necessarily reflect actual guilt (Miller v. United States, 320 F. 2d, supra, at 773)).

2. The trial court instructed the jury in this case that the interest of appellant in the outcome of the trial could be considered in weighing his testimony. A remnant of the discarded common law rule disqualifying an accused person from testifying in his own behalf, this instruction undeniably implied that appellant was not a trustworthy witness and that his testimony should be viewed with suspicion. Such an instruction tends to destroy the presumption of innocence, seriously impinges upon the constitutional right of an accused person to present testimony, and injects a totally irrelevant consideration into the choice of a defendant whether to testify in his own behalf or suffer the adverse influences of silence. See Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965). This court has held that each witness should appear before a jury "on his own" (Bush v. United States, ___ U.S. App. D.C. ____, 375 F. 2d 602, 604 (1967)) and has refused to adopt special cautionary instructions regarding the credibility of police officers notwithstanding their possible interest in securing convictions and avoiding possible charges of false arrest (ibid.). Similarly, fundamental fairness dictates that the defendant in a criminal trial should not be the subject of an instruction which is tantamount to saying that as a class accused persons are inherently untrustworthy.

3. The court below clearly erred in concluding there would be no prejudice to appellant in proceeding to trial in the absence of a key defense witness who, while under subpoena, could not be located and served before the trial date. The police officer testified that after pursuing appellant into a building across the street, he found him in a second floor washroom some ten minutes later with the gun in open view on top of some paper towels in a trash barrel. The obvious purpose of this testimony was to implant in the minds of the jurors the idea that appellant had had the gun in his possession in the washroom but had hastily thrown it into the barrel in an attempt to conceal it at the moment the officer burst into the room. Yet the proffer of evidence showed that the missing witness would have testified that appellant did not have possession of the gun while the witness was in the washroom. This testimony of a disinterested witness at the scene was obviously relevant to the charge and, indeed, very well could have influenced the jury to return a verdict for appellant. Since a continuance was reasonably necessary for a just determination of the cause (Gilmore v. United States, 106 U.S. App. D.C. 349, at 354, 273 F. 2d 79, at 84 (1959)), the trial court should have granted such a continuance on its own motion and appellant is entitled at the very least to a new trial.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CHARGED THE JURY TO CONSIDER EVIDENCE OF APPELLANT'S ALLEGED FLIGHT AND CONCEALMENT AS TENDING TO PROVE CONSCIOUSNESS OF GUILT.

[With respect to Point I, appellant desires the Court to read Transcript pages 21-27, 29-30, 35-38, 40-41, 63-65, 114, 121, 151, 155.]

The Government's direct evidence that appellant was carrying a dangerous weapon was not strong. Accordingly, a crucial and repeatedly stressed aspect of the prosecution's proof was evidence of appellant's alleged flight and subsequent concealment of the weapon. Thus, the arresting officer, who had appellant under "observation" for a period of some fifteen seconds, emphasized in his initial testimony that after seeing appellant display the weapon to his companion for a period of some six seconds (Tr. 36), he shouted to appellant to stop, whereupon the latter ran across the street and disappeared into the American Wholesalers Building (Tr. 29). Later in his testimony, while depicting the events on a blackboard (Tr. 37), the arresting officer repeated that he shouted: "Stop. Hey you, come here a minute" (Tr. 38). At a later point in his testimony, the witness again emphasized (Tr. 38):

> A The defendant turned around, looked at me, and ran.
>
> Q And where did he run the best you can say?
>
> A He ran towards the American Wholesalers. And there is a U.S. Post Office here, packaging building. I couldn't give you exactly what they do in that building. He ran towards the American Wholesalers. There were trucks parked in front of the American Wholesalers at a loading deck. That is when I lost him.
>
> Q Does that dotted line that runs diagonally across this street reflect the approximate line of flight of the defendant after you yelled to him and after he turned around and after he began to run?

A Yes, sir. [2]

Similarly, in "rebuttal" to the testimony of appellant that he did not have a gun in his possession (Tr. 115), the Government called as a witness an employee of the gasoline station in front of which appellant allegedly was seen displaying the weapon. This witness testified that "[t]he officer saw the pistol and hollered at the man, and the one with the pistol took off" and "ran south on Fifth Street" (Tr. 119).

At the Government's request (Tr. 113-14) but over the objection of defense counsel (Tr. 114), the trial court charged the jury as follows (Tr. 151):

> There has been testimony in this case by the Government that there came a time when the defendant allegedly ran into the American Wholesalers. Therefore, it is necessary that I instruct you that flight or concealment by the defendant after the alleged offense of having in his possession a pistol, if you so find that to be the fact, does not create a presumption of guilt. However, you may consider evidence of flight or concealment as tending to prove the defendant's consciousness of guilt. You are not required to do so, but you can consider it if you so desire. You should consider and weigh evidence of flight or concealment by this defendant in connection with all of the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.

It is submitted that in the circumstances of the present case it was erroneous for the district court to single out and solemnize during the final charge to the jury evidence of appellant's alleged flight and subsequent concealment of the weapon. It is undisputed that the arresting officer was not on

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2/ The officer stressed that appellant's companion did not run (Tr. 30).

duty at the time he allegedly saw appellant display the gun and called out to him to "stop" (Tr. 21). While the Government apparently attempted to establish at one point that the officer was wearing certain items of his uniform (Tr. 22, 16), it was disclosed that the policeman in fact was not in uniform, and the Government subsequently abandoned any claim to the contrary. Thus, even if the officer did call out to appellant and even if the latter had heard the command, there was absolutely no duty to respond to someone who, from all appearances, was a total stranger. "The probative effect of flight depends on the conditions and the motives which prompted it" (Vick v. United States, 216 F. 2d 228, at 232 (9th Cir. 1954)) and flight alone is of no value "'whatever unless there are facts pointing to [those] motive[s] . . .'" (ibid.). The present case conceivably would be different had the arresting officer been in uniform or had he otherwise identified himself. Since he was not and did not, there are no facts indicating that a guilty motive prompted the alleged flight, which in these circumstances was fully consistent with innocence.

The circumstances presented here are much less appropriate for substantially crediting evidence of flight than in Wong Sun v. United States, 371 U.S. 471 (1963), where the Supreme Court refused to sanction flight as a ground of probable cause for arrest. In Wong Sun, federal agents, relying upon an informer's statement that he had been sold narcotics by one "Blackie Toy," proceeded at six o'clock in the morning to Toy's laundry. When Toy refused to admit an agent purporting to be a customer, the agent then flashed his badge and identified himself as a narcotics

agent. Toy slammed the door and fled down the hall. He was subsequently apprehended, searched, and arrested. The Court held that the arrest had lacked probable cause because of the ambiguity of evidence of flight (371 U.S. at 483): "Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion."

The issue in Wong Sun, of course, was not whether flight would serve to corroborate proof of guilt at trial, but whether the flight there involved justified an inference of guilt sufficient to generate probable cause for arrest (371 U.S. at 483, n. 10). Nevertheless, the Court stated (ibid.):

> [T]he two questions are inescapably related. Thus it is relevant to the present case that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.

The consistent doubt referred to by the Court may be traced at least as far back as Alberty v. United States, 162 U.S. 499 (1896), where the Court pointed out, "'There are no many reasons for such [flight], consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt'" (at p. 510, quoting from Ryan v. People, 79 N.Y. 593, 601 (1880)). While sustaining the admissibility of evidence of flight as a circumstance to be considered and weighed in connection with other proof, the Court reversed a conviction because the trial Court instructed the jury that flight created a virtual presumption of guilt. The Court stated (162 U.S. at 511):

> [I]t is not universally true that a man, who is conscious that he has done wrong, "will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." Innocent men sometimes hesitate to confront a jury -- not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

See also Hickory v. United States, 160 U.S. 408 (1896); Allen v. United States, 164 U.S. 492 (1896); Starr v. United States, 164 U.S. 627 (1897).

The judicial caution thus engendered has been consistently heeded by the lower courts. In Vick v. United States, 216 F. 2d 228 (5th Cir. 1954), the only evidence of appellant's guilt of operating an illegal distillery was the testimony of four revenue agents who participated in a raid on the illegal distillery. The agents testified that they saw appellant sitting on the ground near the distillery at the time of the raid and that he attempted to run away from the arresting officers. The officers testified that two of the defendants -- appellant's brother and nephew -- were doing work in connection with the distillery but there was no testimony that the appellant was doing anything other than sitting on the ground some 10 to 15 feet from the distillery. Holding evidence of flight in this context insufficient to support the verdict, the Court stated (216 F. 2d at 232):

> Appellant was seen doing no work at the distillery; he had no mash or distillery products on his clothing. He had a shotgun and the woods were good hunting territory. His flight is some evidence against him but under the circumstances of this case, flight alone is weak evidence of guilt. Appellant may have fled because of a sense of guilt, or because he thought that his presence at the distillery was a suspicious circumstance which might lead to his indictment or because he did not want either to disclose the guilt of his brother and his nephew or to be punished for contempt for refusing to do so. One motive is about as likely as another.

See also Miller v. United States, 116 U.S. App. D.C. 45, 320 F. 2d 767 (1963); Burroughs v. United States, 365 F. 2d 431 (10th Cir. 1966).

Moreover, even if some form of comment concerning appellant's alleged flight in the present case was proper, the instruction actually given erroneously failed to inform the jury that such flight was fully consistent with innocence. True, the Supreme Court in the cases referred to above generally approved the admissibility of flight evidence for whatever it is worth. But this approval was premised on the clear supposition that the circumstances of flight and concealment would be treated by the trial courts with "that caution and circumspection which their inconclusiveness when standing alone require" (Hickory v. United States, 160 U.S. 408 at 417).

In Miller v. United States, supra, this Court noted that the following erroneous assumption underlies the legal relationship between flight and guilt: First, it is assumed that a person fleeing shortly after a criminal act has been committed does so because he feels some guilt concerning the act, and, further,

that a person who feels guilt concerning an act has committed that act. Since "available empirical data suggests the wisdom of caution concerning this assumption" (320 F. 2d at p. 772), the Court fashioned an instruction designed to guard against the ambiguous nature of flight evidence and to "caution against the dangers of drawing conclusions from superficial consideration of experience" (id., at 773, n. 14).[3/] When evidence of flight has been introduced, the trial court should warn the jury that (id. at 773):

> [F]light does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they are not to presume guilt from flight; that they may, but need not, consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt.

The district court in the present case did not comply with these requirements. While the court properly told the jury that flight did not create a presumption of guilt, it failed to lay the predicate for that instruction by forthrightly cautioning that "flight does not necessarily reflect feelings of guilt, and that feelings of guilt . . . do not necessarily reflect actual

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3/ "The need for this caution," the Court said (ibid.), "is highlighted by Judge Learned Hand's observation . . . 'that flight is a circumstance from which . . . everyone in daily life inevitably would infer [guilt].'" In a kindred context, the courts have recognized that the popular notion that innocent persons do not confess to crimes is just not so. See Jackson v. Denno, 378 U.S. 368 (1964).

guilt." The court's failure adequately to guard against the dangers of such inherently ambiguous evidence is not harmless error. Had the court charged, as contemplated by the Miller instruction, that the arresting officer was not in uniform and did not identify himself, and that appellant's failure to stop was consistent with innocence, the jury might well have ignored this vital aspect of the Government's case. If so, they might well have concluded that evidence of a brief glimpse of a shining object in appellant's hand was insufficient.

II. THE JURY WAS IMPROPERLY INSTRUCTED TO CONSIDER APPELLANT'S INTEREST IN THE OUTCOME OF THE TRIAL IN ASSESSING HIS CREDIBILITY AS A WITNESS.

[With respect to Point II, appellant desires the Court to read Transcript page 151.]

One of the rejected premises underlying the reliability of evidence of flight is the notion that innocent persons "do not hesitate to confront a jury of their country, because that jury will protect them. It will shield them and the more light there is let in upon their case the better it is for them" (Starr v. United States, 164 U.S. 627, quoted in 2 Wigmore on Evidence, Section 276, at pp. 114-15 (3d Ed.)).[4/] Yet, if an accused person like appellant in the present case chooses to "confront a jury," it is likely to be one which has been instructed by the court that the testimony of a defendant in a criminal case is entitled to little weight. Thus, the court below, in addition to a general credibility instruction (Tr. 149), charged the jury (Tr. 151):

4/ The quoted language is from the trial court's charge to the jury in Starr.

> Now the defendant in a criminal case is permitted to become a witness on his own behalf, and his testimony should not be disbelieved merely because he is the defendant; but in weighing his testimony, you may consider that the defendant does have a vital interest in the outcome of this trial. You should give, therefore, his testimony such weight as in your judgment it is fairly entitled to receive.

Such an instruction, with its undeniable implication that appellant was not a trustworthy witness, clearly erodes the presumption of innocence.[5/] It seriously interferes with the right of an accused person to present his own testimony in refutation of the charges against him and is plainly erroneous (Rule 52(b), Federal Rules of Criminal Procedure; see Payton v. United States, 96 U.S. App. D.C. 4, 222 F. 2d 794 (1955)).

The challenged instruction is, of course, a remnant of the discarded common law rule that accused persons were not competent to testify in their own behalf. See, e.g., Ferguson v. Georgia, 365 U.S. 570 (1961); Washington v. Texas, ___ U.S. ___ (1967), 35 Law Week 4677. This common law rule, as well as other former disqualifications for interest, rested on the premises (1) that the right to testify was subordinate to the interest of the court in preventing perjury and (2) that erroneous decisions were best avoided by preventing the jury

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5/ Compare United States v. Meisch, 370 F. 2d 768 (3d Cir. 1966); Stone v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (1967)(No. 20, 354).

from hearing testimony that might not be true.[6/] Since "the dead hand of the common law rule" (Rosen v. United States, 245 U.S. 467, at 471 (1918)) has long since been lifted, there is no cogent reason for failing to treat the credibility of an accused person testifying in his own behalf on precisely the same basis as any other witness. To the contrary, any rule substantially discouraging an accused person from testifying in his own behalf intrudes seriously upon his Sixth Amendment right to offer testimony, unless that rule serves some other compelling objective. See In re Oliver, 333 U.S. 257 (1948). The credibility instruction involved here promotes no such goal and can serve only to prejudice defendants in criminal cases. See Pinkney v. United States, ___ U.S. App. D.C. ___, 363 F. 2d 696 (1966).

In Bush v. United States, ___ U.S. App. D.C. ___, 375 F. 2d 602 (1967), this Court properly declined to make police officers the subject of special cautionary instructions concerning their credibility notwithstanding possible inducements based on such considerations as the general pressure to secure convictions and the fact that police officers if guilty of false arrest or illegal detention may risk civil suit, police discipline or even criminal prosecution. The Court ruled that each witness

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6/ "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors" (Benson v. United States, 146 U.S. 325, at 336 (1892)).

should appear before a jury "on his own" and that "jurors may believe or disbelieve, accept or discount, testimony on the basis of what the witness says or does or on the basis of impeachment evidence" (375 F. 2d at 604). But, the Court stressed, there is no basis for an instruction that "would be tantamount to saying that police officers are inherently untrustworthy" (ibid.). See also Brooke v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (1967)(No. 20, 241). By a parity of reasoning, it is fundamentally unfair for the trial court in its charge to the jury to single out the interest of the accused person alone and to invite that his testimony be viewed with suspicion. The defendant's demeanor on the stand is itself a reliable indicator of his trustworthiness. The Government can examine with respect to such ordinary matters relating to credibility as the defendant's memory and capacity for observation, and it can prove prior inconsistent statements. Thus, the instruction at issue does not aid in the ascertainment of truth and is not needed.

Moreover, abandonment of the archaic notion that an accused person is inherently untrustworthy is necessary to effectuate the principles enunciated by this Court in Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965). In Luck, the Court noted the many problems involved in using previous convictions for impeachment purposes. It deplored the fundamental unfairness which exists when a rule may deter a defendant from testifying in his own behalf, or, if he does choose to testify, will subject him to evidence which is extremely prejudicial on the basic issue of guilt, although such evidence is not admissible

on that issue. See Brown v. United States, ___ U.S. App. D.C., ___, 370 F. 2d 242 (1966); Stevens v. United States, ___ U.S. App. D.C. ___, 370 F. 2d 485, at 486 (dissenting opinion of Judge Fahy) (1966). "Thus," as the Court said in the Brown case (370 F. 2d at 243-244), "the impeachment rule confronts the defendant with a dilemma. Although his testimony may provide useful, even critical, information, he must weigh the prejudice that will attend exposure of his criminal record. Too often the defendant is kept from the stand or, having risked impeachment, is clearly prejudiced by admission of his prior record."

Precisely the same prejudice and basic unfairness flows from the type of credibility instruction given by the trial court in the present case -- an instruction which merely emphasizes with the persuasiveness of judicial utterance what most juries probably already suspect. A defendant in a criminal case should not be driven to the stand from fear of adverse inferences resulting from silence. Neither should he be deterred from testifying by fear that a prior record may be unfairly exposed or by fear that the trial judge, as in the present case, will charge the jury, in effect, that he is unworthy of trust in testifying. In short, the choice to testify should not be influenced by such extraneous matters, but only by considerations relating to the merits of the case. The instruction of the court below injects a totally irrelevant consideration into this choice and should be disapproved.

III. A CONTINUANCE OF THE TRIAL SHOULD HAVE BEEN GRANTED WHEN A MATERIAL WITNESS FOR THE DEFENSE COULD NOT BE PRODUCED.

[With respect to Point III, appellant desires the Court to read Transcript pages 3-5, 24-27, 41, 79.]

Following the appointment of counsel by the district court, appellant applied for and was granted subpoenas for two witnesses. Only one of these witnesses -- the companion to whom appellant allegedly displayed the weapon -- appeared in court on the trial date. The other witness, who was present in the washroom where appellant allegedly concealed the weapon and where he was subsequently arrested, could not be found and served before the trial date, and accordingly did not appear in court (Tr. 3). 7/

While defense counsel did not request a continuance in order to attempt to locate the missing witness (Tr. 3), he informed the court that "[m]y client does, in fact, want him here, but wanting him here doesn't mean we have been able to find him. The defendant has not been able to find him, although I have requested him to do so" (ibid.). 8/

In answer to the court's request for a proffer of the testimony of the missing witness, defense counsel stated (Tr. 4):

7/ While another person in addition to the missing witness was present in the washroom at the time of appellant's arrest, he was a total stranger to appellant and no attempt was made to subpoena him. Since the arresting officer did not interview the other two persons present in the washroom, he was unable to identify either of them (Tr. 41).

8/ Appellant, who was released on his own personal recognizance pending the trial, unsuccessfully assumed the task of locating and serving the missing witness.

> " . . . At the time the officer came into the men's room at the place of employment of the defendant he, the [missing] witness Adams, was supposedly there; and he supposedly can testify that the defendant did not have the gun, a gun in his possession and that the officer walked over to a trash can and pulled the gun from the trash can and alleged that the gun had been in the possession of the defendant at the time the police officer first started pursuit of the defendant."

The Government's answering proffer was concerned only with the recovery of the gun. Thus, the prosecuting attorney stated (Tr. 4): "The officer did not see the gun in the hand of the defendant at the time of the recovery. The recovery was made with the defendant next to the trash barrel, with the gun on top of the refuse in the trash barrel." Apparently in the belief that there was no inconsistency between these proffers of testimony, the trial court ruled that "[u]nder those circumstances, I don't think the defendant would be prejudiced by the absence of the witness" (Tr. 5). The trial accordingly proceeded without this defense witness.

It it submitted that the trial court erred in failing on its own motion to order a continuance for a reasonable period of time to allow a further attempt to locate and serve the missing witness. The compulsory process provision of the Sixth Amendment absolutely guarantees a defendant in a criminal trial the right to summon to his aid witnesses who may offer proof to negate the Government's evidence or to support the defense. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); MacKenna v. Ellis, 280 F. 2d 592 (5th Cir. 1960); Paoni v. United States,

281 Fed. 801 (3rd Cir. 1922); and United States v. Seeger, 180 F. Supp. 467 (D.C. N.Y. 1960). And this opportunity to meet the prosecution's case is historically and in practice so fundamental to a fair trial that the right to process can be knowingly waived only by a defendant, not by his attorney. See, e.g., United States v. Pate, 345 F. 2d 691, at 697 (7th Cir. 1965); cf., Fay v. Noia, 372 U.S. 391, at 439 (1963). Appellant's unwaived wish to have the missing witness in Court was made clear to the trial judge. The Court's decision to proceed to trial without the witness was based on the completely mistaken impression that the witness would testify only that appellant did not have the gun in his hand at the time the officer came into the room. In point of fact, it was proffered the witness would testify that appellant did not have a gun in his possession at any time while the witness was in the washroom.

These facts fully meet the requirement in this circuit that a continuance must be granted when it appears "reasonably necessary for a just determination of the cause" (Gilmore v. United States, 106 U.S. App. D.C. 349, 354, 273 F. 2d 79, 84 (1959)).[9/] See also Neufield v. United States, 73 U.S. App. D.C. 174, 118 F. 2d 375 (1941), cert. den. sub nom. Rubin v.

9/ "Such a showing [of reasonable necessity] is made by offering to prove what evidence, if any, will be gained by the grant, and what relevance it has to the charge" (ibid).

United States, 315 U.S. 798; compare Dyer v. United States, ___ U.S. App. D.C. ___, ___ F. 2d ___ (1967)(No. 20,052). The Government's case against appellant was considerably less than overwhelming. The police officer testified that he found the weapon in open view on top of some paper towels in a trash barrel in the washroom in which appellant was found some ten minutes after being accosted in the street (Tr. 39). The clear and intended implication of this testimony was to the effect that appellant had been in possession of the gun in the washroom but had hastily thrown it into the barrel in an attempt to conceal it at the moment the officer burst into the room. Yet the proffer of testimony showed that the missing witness would have testified that appellant did not have possession of the gun while the witness was with him in the washroom. This testimony of a disinterested witness at the scene very well could have tipped the scales in favor of appellant and he is entitled to a new trial at which this testimony could be presented.

CONCLUSION

For the reasons set out above, appellant's conviction should be reversed or the case remanded for a new trial.

Respectfully submitted,

HERBERT A. BERGSON
DONALD L. HARDISON
Bergson & Borkland
888 17th Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Appointed by this Court)

July 3, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,025

AVON BURKE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT K. WEBSTER,
ARTHUR L. BURNETT,
Assistant United States Attorneys.

Cr. No. 51-67

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) After the introduction of substantial evidence of appellant's possession of a revolver and his flight when told to halt by a police officer, was it proper for the trial court to instruct the jury on the issue of flight and concealment? If so, can appellant for the first time on appeal challenge the wording of that instruction when he did not object below to its wording. If so, was it proper for the trial court to instruct the jury that evidence of flight and concealment may be considered as tending to prove consciousness of guilt, but is not required to be?

2) Can appellant for the first time on appeal challenge an instruction on his credibility when he did not object below to the giving of an instruction on his credibility or to its wording? If so, was it proper for the trial court to instruct the jury that in assessing appellant's credibility, it could consider that appellant had a vital interest in the outcome of the trial?

3) Did the trial court abuse its discretion in not granting on its own motion a continuance when a witness for the defense was not procured where (a) that witness' testimony was but cumulative and not material, establishing merely that appellant did not have the weapon in his possession at the time of his arrest, a circumstance conceded in the Government's evidentiary proffer and testified to by the arresting officer and (b), appellant acquiesced in the Government's evidentiary proffer and made no objection to the trial court's decision to proceed ahead and (c), appellant never again during the entire course of the trial made known a desire to have the missing witness present.

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TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,025

AVON BURKE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment with carrying a pistol without a license in violation of 22 D.C. Code § 3204. After a trial before a jury and District Court Judge Aubrey E. Robinson on March 21, 1967, the jury returned a verdict of guilty. (Tr. 157) Appellant was sentenced to imprisonment for a term of one to three years.

Prior to the opening statements, appellant noted the absence of a witness, one Bobby Adams, who could give testimony as to those events surrounding the arrest and recovery of the revolver. Appellant accepted the Govern-

ment's proffer that the arresting officer did not see the gun in the hand of appellant at the time of the arrest and that the gun was found in a nearby trash can. (Tr. 3, 4, 5) No motion for a continuance was made at this time or any other time throughout the course of the trial, and at no time was any dissatisfaction expressed by appellant over the absence of this witness.

The Government's evidence at trial, in the form of testimony by Officer Ralph S. Tapscott, showed that Officer Tapscott, while standing in front of a large window inside an Esso Station at the corner of Fifth Street and Rhode Island Avenue, Northeast, at noon on December 2, 1966, saw appellant show a revolver to his companion as they walked by the gas station toward Fifth Street. (Tr. 21, 23, 27, 40) Officer Tapscott was no more than ten feet from appellant at this time and observed appellant's actions fully with an unobstructed view. So observing appellant for some fifteen seconds, Officer Tapscott watched as appellant pulled from his pocket a chrome-plated revolver with a dark handle, hesitated and then displayed the revolver to his companion for about six seconds. (Tr. 30, 31, 35, 36) Officer Tapscott's familiarity with guns, the result of a hobby of collecting them as well as his experience with his own revolver, and the clarity of his view of appellant's movements enabled him to identify the object in appellant's hand as a revolver with certainty. Appellant's companion was to his left with Officer Tapscott to his right, and by using his right hand to display the gun appellant further contributed to Officer Tapscott's clear perception of the weapon. (Tr. 35, 36, 37)

Although off duty, after observing the revolver in appellant's hand, Officer Tapscott walked outside through the door next to the window and called to appellant to halt in the words: "Stop. Hey you, come here a minute" (Tr. 22, 23, 38). Officer Tapscott was wearing his "police pants, sweater, shirt and tie" and a slip-over jacket at the time (Tr. 22). He also had a police revolver. On

hearing Officer Tapscott's command to halt, appellant, having just put the revolver back into his pocket, turned around and looked at Officer Tapscott and then ran towards Fifth Street in the direction of the American Wholesalers' building on that block. Officer Tapscott gave chase, losing appellant momentarily behind a truck that was unloading at American Wholesalers. The officer then entered the American Wholesalers' building and was told by the switchboard operator that someone had just preceded him in that entrance. After instructing her to call a scout car, he then described appellant to the foreman at American Wholesalers and learned from him that a man fitting that description had just gone up to the second floor men's room. On entering the men's room, Officer Tapscott found appellant and arrested him. He then searched appellant and after finding nothing on him noticed a revolver similar to that appellant was previously carrying in a large trash can next to appellant, lying halfway down on top of some paper towels. (Tr. 22, 23, 24, 25-27, 38, 39)

It was stipulated that appellant did not have a license to carry a firearm on December 2, 1966 (Tr. 54).

Appellant took the stand in his own defense, testifying that he was proceeding to American Wholesalers with a fellow employee, one Horace Collins. He testified that he had no firearm in his possession either in front of the Esso Station or later in the men's room, that he heard no one call to him in front of the Esso Station, and that the first time he saw Officer Tapscott was in the men's room just prior to his arrest. (Tr. 59, 64, 65, 72, 81) Appellant admitted wearing an outfit fitting the description given by Officer Tapscott (Tr. 81).

Horace Collins was called as a witness by appellant and confirmed his story. He testified that appellant had shown him no gun in front of the Esso Station; he observed no police officer when he was with appellant. The witness claimed appellant did not run back to American Wholesalers but rather walked quickly. On returning to

American Wholesalers, Mr. Collins testified that he and appellant parted, appellant entering the regular employees' entrance and the witness going in the door leading to the shipping department. (Tr. 89, 90, 99)

In rebuttal, the Government put on William Griffin, an employee of the Esso Station at the corner of Rhode Island Avenue and Fifth Street. His testimony corroborated that of Officer Tapscott. While looking outside through the large window of the gas station, Mr. Griffin saw appellant pull a revolver and show it to his companion. (Tr. 119, 120) He observed Officer Tapscott call to appellant at which time appellant "took off, started running" (Tr. 119). The Government then rested.

The Government requested an instruction on flight and concealment which was given by the trial judge. Appellant, without offering an alternative instruction, expressed the view that there was insufficient evidence in the record to sustain the giving of such a charge. (Tr. 114, 115, 151) After it was given, appellant objected "not to the wording of the instruction, but to the giving of it in this case" (Tr. 155).

No other requests for instructions were made by either side.

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, Section 3204 provides:

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished is provided in Section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in

> another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> "At the close of the evidence or at such time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.

Rule 52(b), Federal Rules of Criminal Procedure, provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The trial court properly gave a charge as to flight and concealment. Contrary to appellant's claim that "there are no facts indicating that a guilty motive prompted the alleged flight", the evidence at trial showed that appellant exhibited for some six seconds a revolver to his companion, that immediately thereafter a call to halt followed from an off-duty, partly uniformed policeman who had been standing about ten feet away, and that appellant turned around, looked at the policeman and then "took-off", eventually taking sanctuary in the washroom of a nearby building in which he worked. So viewed, the record is sufficient to support the inference that appellant's flight was borne of a consciousness of his guilt. That such an inference is not the only permissible inference from the fact of appellant's flight and that his flight

may have been prompted by other motives do not render inappropriate an instruction on that flight.

Having made no objection to the wording of the trial court's instruction on flight and concealment and having failed to offer any alternative instruction, appellant is foreclosed from challenging the wording of that instruction on appeal absent a showing of plain and substantial error. Having failed to ask at trial for an elaboration of the inferential nuances of flight, appellant cannot now complain.

In any event, the trial court properly phrased the charge on flight and concealment. It made explicit that flight did not create a presumption of consciousness of guilt, but that rather this was a permissible inference the jury might draw if it so desired. By so instructing the jury, it complied with the well settled law in this jurisdiction.

II

Having made no objection at trial to the instruction on credibility and having failed to offer any alternative instruction, appellant is foreclosed from challenging that instruction on appeal absent a showing of plain and substantial error.

The trial court's instruction on appellant's credibility, making reference to his stake in the outcome of the trial, was appropriate and did not constitute plain error. Using no words of denunciation, suspicion or special scrutiny, the trial court merely clarified the jury's prerogative that they were entitled to but need not take account of this peculiar factor in assessing appellant's credibility. In no way did the trial court's instruction resemble a special cautionary instruction to which appellant attempts to analogize it; the trial court rather left it to the jury to give appellant's testimony such weight as they thought it fairly entitled to receive.

III

The grant or refusal of a continuance is a matter within the sound discretion of the trial judge to whom application is made. The trial judge in the instant case did not abuse his discretion in not granting on his own motion a continuance when a witness for the defense could not be procured. The testimony of the missing witness was but cumulative and not material, establishing merely that appellant did not have the weapon in his possession at the time of his arrest, a circumstance conceded in the Government's evidentiary proffer and testified to by the arresting officer. Appellant acquiesced in the Government's proffer and made no objection to the trial court's decision to proceed ahead. Appellant never again during the entire course of the trial made known a desire to have the missing witness present, reinforcing the trial court's view that it had properly assessed the thrust of appellant's proffer, as well as indicating on appeal the accuracy of that assessment.

ARGUMENT

I. The trial court properly charged the jury that it could consider evidence of appellant's flight and concealment as tending to prove consciousness of guilt, although it was not required to do so.

(Tr. 22, 23, 29, 31, 35, 36, 38, 119, 120)

A. The trial court properly gave a charge as to flight and concealment.

Appellant asserts as reversible error the decision of the trial court to give an instruction on flight and concealment. Appellee contends that the circumstances of the instant case clearly warranted such an instruction.

Appellant made no objection during the trial to the introduction of evidence concerning defendant's alleged flight. Indeed such evidence has long been held admissible to show consciousness of guilt. See *Allen* v. *United*

States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963); *Edmonds* v. *United States*, 106 U.S. App. D.C. 373, 273 F.2d 108 (1959); *Tolliver* v. *United States*, 106 U.S. App. D.C. 398, 273 F.2d 523 (1959); *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958).

Apparently conceding the admissibility of evidence of flight to show consciousness of guilt, appellant nonetheless objects to an instruction by the trial judge on such evidence, claiming "there are no facts indicating that a guilty motive prompted the alleged flight, which in these circumstances was fully consistent with innocence." (Br. at 14) That there are no facts surrounding the alleged flight from which a jury might infer a guilty motive and that appellant's flight was, as it were, unambiguously innocent as a matter of law are propositions clearly belied by the record. The alleged flight did not occur in a void; the Government carefully wove by direct and credible testimony a web of fact giving to that flight a clear meaning and purpose.

At trial there was adduced substantial evidence that appellant had in his possession a revolver at noon on December 2, 1966 near the corner of Fifth Street and Rhode Island Avenue, Northeast. The arresting officer so testified with certainty after having observed appellant exhibit the weapon for some six seconds at a distance of ten feet. (Tr. 23, 29, 31, 35, 36) A gas station employee provided corroborating evidence of appellant's possession of the weapon (Tr. 119, 120). Officer Tapscott, although off-duty, was wearing his "police pants, sweater, shirt and tie" and a slip-over jacket (Tr. 22). He also had in his possession his police revolver. Having so observed appellant, Officer Tapscott stepped outside the gas station in which he was standing and called to appellant in clear words of authority: "Stop. Hey, you, come here a minute" (Tr. 38). Appellant turned around, looked at Officer Tapscott, and ran. (Tr. 22, 38, 119, 120)

Viewing the evidence most favorable to the Government, appellant's perspective immediately prior to flight was not, as he would have it, merely one of an individual hearing a command to halt; it was rather the perspective of an individual *who had just openly exhibited a revolver* hearing a command to halt. Further, the command came from one who by virtue of his dress and the tone of his voice might reasonably have represented some sort of civil authority. So viewed, appellant's momentary exhibition of the revolver he possessed and the call to halt which followed immediately thereafter are sufficient to support an inference that appellant's subsequent flight was borne of a consciousness of his guilt.

That such inference is not the only permissible inference from the fact of appellant's flight and that his flight may have been prompted by other motives do not render inappropriate an instruction on that flight. In *Miller* v. *United States*, 116 U.S. App. D.C. 45, 329 F.2d 782 (1963), defendant fled when called to by his civilian victim. This Court, in sustaining a charge on flight using the word "presumption" to describe the nature of the inference to be drawn, held that even under circumstances where the person calling "halt" is a civilian and where defendant may be fleeing for reasons other than fear of arrest, the jury is nonetheless to be permitted to draw the inference of consciousness of guilt from the fact of defendant's flight. *Miller*, *supra* at 48, 52. A fortiori, *an instruction* on flight where the motive for such flight was ambiguous is proper. The absence of a legal duty to stop is no bar to such a charge. *Miller*, *supra* at 48.

Appellant's use of *Wong-Sun* v. *United States*, 371 U.S. 471 (1963) and *Vick* v. *United States*, 216 F.2d 228 (5th Cir. 1954) is inapposite. *Vick*, standing for the proposition that evidence of flight *alone* is insufficient to support a verdict of guilty, in no way impairs the probative value of evidence of flight or the propriety of a charge thereon when, as in the instant case, that evidence is coupled with other substantial evidence of guilt. The

instant case differs from *Wong-Sun* in that here, direct independent evidence of a wrongdoing existed *at the time of flight.* In *Wong-Sun* none existed at this time, and although subsequent evidence of a wrongdoing was adduced, it was gotten only through the medium of an arrest for which there was no probable cause, and hence such evidence was inadmissible. Flight alone did not justify the arrest in *Wong-Sun,* but flight alone is not this case. Surely if the arresting officers there had directly observed a packet of heroin on Wong-Sun's person when he opened the door, as the arresting officer here in fact observed a revolver on the person of appellant prior to making the arrest, subsequent flight would have taken on a new and far greater probative value. To analogize the instant case to *Wong-Sun,* as appellant has done, without greater analysis obliterates a crucial distinction between the two.

In short, the record of the instant case discloses ample evidence from which a jury might infer from the fact of appellant's flight a consciousness of his own guilt. Notwithstanding appellant's elaborate discussion, in no case that he cites has a court ever held that such evidence is without probative value as to consciousness of guilt or that a properly phrased charge to the jury on such evidence is inappropriate.

B. ***Having made no objection to the wording of the trial court's instruction on flight and concealment and having failed to offer any alternative instruction, appellant is foreclosed from challenging the wording of that instruction on appeal absent a showing of plain and substantial error.***

(Tr. 155)

Appellant next argues that even if the circumstances of the case had warranted a charge on flight and concealment, the instruction actually given by the trial court was prejudicial. It is well settled, however, that an appellant is ordinarily foreclosed from attacking on appeal

instructions which he accepted at trial. Fed. R. Crim. P. 30. *Kelley* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Rivera* v. *United States*, 124 U.S. App. D.C. 99, 361 F.2d 553, *cert. denied*, 385 U.S. 938 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

At trial, appellant made no objection to the content or wording of the charge of flight and concealment nor did he offer an alternative charge after it was apparent that the trial judge intended to charge the jury on that issue. Indeed, after the instruction was given he stated, "May the record show my objection to the instruction on the evidence of flight in this case, *not to the wording of the instruction*, but to the giving of it in this case" (Tr. 155). (Emphasis added) Having failed to object at trial to the wording of the charge on flight and having impliedly assented to it, appellant is foreclosed from challenging that wording on appeal absent a showing of plain and substantial error.

C. *The trial court properly phrased the charge on flight and concealment, and in any event the wording of that instruction did not constitute plain and substantial error.*

The trial judge gave the following instruction on flight and concealment:

> "There has been testimony in this case by the Government that there came a time when the defendant allegedly ran into American Wholesalers. Therefore, it is necessary that I instruct you that flight or concealment by the defendant after the alleged offense of having in his possession a pistol if you so find that to be the fact, does not create a presumption of guilt. However, you may consider evidence of flight or concealment as tending to prove the defendant's consciousness of guilt. You are not required to do so, but you can consider it if you so desire. You should

> consider and weigh evidence of flight or concealment by this defendant with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." (Tr. 151)

Appellant argues that on the basis of *Miller* v. *United States*, 116 U.S. App. D.C. 45, 329 F.2d 782 (1963), the trial court's instruction "erroneously failed to inform the jury that such flight was fully consistent with innocence". (Br. at 17)

Appellant misconceives the thrust of the *Miller* case. The instruction there appealed stated that flight brought into the case an element of "presumption" (*Miller* v. *United States*, *supra* at 47, 48) in clear violation of the command of *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 3, 316 F.2d 652 (1963), that ". . . flight certainly does not raise a presumption of guilt . . .". Speaking to the issue of plain error, Judge Bazelon stated, "I think the flight instruction considered as a whole, was not plain error affecting appellant's substantial rights" (*Miller*, *supra* at 48), and this even where the instruction contained words of presumption. Judge Fahy, reversing on other grounds, reiterated the command of *Hunt*:

> "That in instructing on flight it would be made clear that there is no presumption but only that flight may be, but is not required to be, the basis for an inference indicating guilt. There is an important distinction the law draws between a presumption and the right of a jury to draw an inference;" *Miller*, *supra* at 52.

In the instant case, the trial judge followed the letter of that command. He made explicit to the jury the proposition that "flight does not create a presumption" but merely creates a permissible inference of consciousness of guilt which the jurors could draw if they so desired. (Tr. 151) He stressed the permissive nature of the inference, implicit in which was the notion that neither consciousness of guilt nor of innocence is neces-

sarily to be inferred from evidence of flight. The court's charge conformed to that suggested in the handbook of *Criminal Jury Instructions* compiled by the Junior Bar Association of the District of Columbia.[1] It fairly conveyed to the jury the import of appellant's alleged flight if they chose to find it as fact.

Appellant, however, cites *Miller* for the proposition that a further explication of the inferential nuances of flight, as suggested by Judge Bazelon toward the latter part of his opinion, is now required of the trial court. Appellant gratuitously refrains from stating the full requirement of the heretofore unrequired instruction, namely that appellant actively requested it.[2] In the instant case, appellant sat silently throughout the trial, not objecting to any of the extensive evidence of flight and concealment introduced by the Government. He explicitly stated his lack of objection to the wording of the court's charge on this issue after it was given. At no time did appellant feel compelled to request of the court that it explain further the inferential possibilities of evidence of flight. It would be strange indeed if appellant

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[1] "Flight or concealment by the defendant, after a crime has been committed, does not create a presumption of guilt. You may consider evidence of flight or concealment, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so. You should consider and weigh evidence of flight and concealment by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive." Handbook on *Criminal Jury Instructions*, edited by the Junior Bar Association of the District of Columbia, p. 27.

[2] "When evidence of flight has been introduced into a case, in my opinion, the trial court should, *if requested*, explain to the jury in appropriate language that flight does not necessarily reflect feelings of guilt, and that feelings of guilt which are present in many innocent people do not necessarily reflect actual guilt. This explanation may help the jury to understand and follow the instruction which should then be given, that they may but need not consider flight as one circumstance tending to show feelings of guilt; and that they may, but need not, consider feelings of guilt as evidence tending to show actual guilt." *Miller* v. *United States*, *supra* at 51. (emphasis added)

were here allowed to be silent during trial, only to prevail on appeal by urging a new and untested doctrine, an announced requirement of which is that appellant not be silent at trial but rather explicitly ask that it be applied. Having failed to ask for an elaboration, appellant cannot now complain.

In any event the instruction adequately complied with the law in this jurisdiction. The standard charge on flight, set forth in *Edmonds* v. *United States*, 106 U.S. App. D.C. 373, 273 F.2d 108 (1959), sanctioned by this Court in numerous cases since, and given by the trial court in this case fairly apprises the jury of the inferences they may and may not draw from the fact of flight if they so find it. It is a concise and accurate tool which the court in the instant case, having regard for the rights of appellant as well as the probative value of the evidence of flight, in its wisdom properly applied.

II. The jury was properly instructed that it could consider appellant's interest in the outcome of the trial in assessing his credibility as a witness.

(Tr. 149-151)

Appellant raised no objection at trial to the court's instruction on his credibility nor did he offer any alternative instruction on credibility. For reasons previously stated (*supra* 10, 11), he is foreclosed from challenging that instruction on appeal.

In any event, the trial court's instruction fairly apprised the jury of matters which legitimately affected appellant's credibility.[3] It conformed to that used for the

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[3] The charge on credibility stated:

> Now the defendant in a criminal case is permitted to become a witness on his own behalf, and his testimony should not be disbelieved merely because he is the defendant; but in weighing his testimony, you may consider that the defendant does have a vital interest in the outcome of this trial. You should give, therefore, his testimony such weight as in your judgment it is fairly entitled to receive. (Tr. 151.)

other witnesses in the case (Tr. 149, 150) with the exception of its reference to appellant's vital interest in the outcome of the trial. Appellant, by some arcane logic, concludes that this additional explanatory statement implies that he is "not a trustworthy person" (Br. at 20), that he is "inherently untrustworthy" (Br. at 22), and thus that his testimony is entitled to "little weight" (Br. at 19). It has no such import.

Courts have long recognized the propriety of an instruction in which reference is made to a defendant's stake in the outcome of the trial. In *Reagan* v. *United States*, 157 U.S. 301, 304 (1895), the Supreme Court, in sustaining a charge similar to that in the instant case, made the following observation.

> It is within the province of the court to call the attention of the jury to any matters which legitimately affect his [defendant's] testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is therefore a matter properly to be suggested by the court to the jury.

See also *Fisher* v. *United States*, 80 U.S. App. D.C. 96, 149 F.2d 28 (1945), *aff'd*, 328 U.S. 462 (1948); *Shettel* v. *United States*, 72 U.S. App. D.C. 250, 113 F.2d 34 (1940).

These cases reflect a judgment that the demands of basis fairness are not violated where the trial court calls to the jury's attention a defendant's stake in the verdict as one possible factor to be weighed in assessing his credibility. In *Reagen*, as here, the court was careful to point out that the defendant may take the stand in his own defense, informing the jury that it was their prerogative to believe or disbelieve the defendant as they chose. If they chose to disbelieve him, that choice was

not solely to be based on the fact that he was the defendant. The court in the instant case used no words of denunciation, suspicion or special scrutiny. Its reference to appellant's vital interest in the outcome was neither a wish nor a command that this be taken account of. It was rather a clarification of the jury's prerogative, that they were entitled to but need not take account of this peculiar factor in assessing appellant's credibility. The logic of this prescription in no way affords a basis for the inference that appellant is inherently untrustworthy or that his testimony is to be given little weight.

Appellant argues that this Court's refusal to require a special cautionary instruction to be given with regard to a police officer's testimony in *Bush* v. *United States*, — — U.S. App. D.C. ——, 375 F.2d 602 (1967), precludes the trial court from giving the instant instruction on defendant's credibility. In *Bush*, however, the trial court was asked by defendant for an instruction that a police officer's testimony *be received with suspicion and acted upon with caution.* It refused, instead instructing the jury that it was to consider "bias, prejudice, and any other interest in the outcome of the case which a witness might have . . . ." *Bush, supra* at 377. The "parity of reasoning" which appellant invokes was in fact employed by the trial court in the instant case, for it similarly refused to deprecate the testimony of appellant with a special cautionary instruction. Surely appellant recognizes the vast difference between an instruction that one's testimony is to be viewed with suspicion and acted upon with caution, and the charge in the instant case that the jury should give appellant's testimony such weight as in their judgment it was fairly entitled to receive (Tr. 151).

Appellant's reliance on *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 767 (1963) is misplaced. There, this Court held the Government's use of prior convictions to impeach a defendant's credibility not to be a matter of right, but rather within the trial judge's dis-

cretion, balancing the prejudicial effect of the impeachment and the probative value to credibility of the prior conviction. The trial court's instant instruction on appellant's credibility similarly reflects an attempt to accommodate these competing interests, freedom from prejudice and probative relevance. That it succeeded is indicated not only by the content of the charge but also by the fact that appellant raised no objection at trial to it.[4]

There exists no basis for changing the long settled rule that the court may instruct the jury to consider, if it so wishes, a defendant's interest in the outcome of the trial in assessing his credibility.

III. The trial court did not abuse its discretion in not granting on its own motion a continuance when a witness for the defense could not be procured.

(Tr. 3, 4, 5)

The grant or refusal of a continuance is a matter within the discretion of the trial judge to whom application is made. *Neufield* v. *United States*, 73 U.S. App. D.C. 174, 118 F.2d 375 (1941). His decision is not subject to reversal absent a clear abuse of that discretion. *Gilmore* v. *United States*, 106 U.S. App. D.C. 344, 273 F.2d 79 (1959). In the instant case, the trial judge did not abuse his discretion in not granting on his own motion a continuance when it appeared that appellant was unable to procure a witness. By the terms of appellant's

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[4] Parenthetically, under *Luck* it is defense counsel's obligation to move for a preliminary inquiry on whether or not to permit impeachment by prior convictions. Subsequent decisions of this Court have held that where no objection is made at trial, it is not plain error for the court to permit this form of impeachment. *Covington* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 246 (1966); *Hood* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 949 (1966); *Walker* v. *United States*, 124 U.S. App. D.C. 194, 363 F.2d 681 (1966). *Luck* principles would seem to strengthen appellant's existing obligation to first make known below his objection to the court's charge on both flight and credibility.

own proffer and the Government's succeeding proffer, as well as the actual testimony of Officer Tapscott, the missing witness would not have materially added to appellant's case. His testimony, according to the terms of appellant's proffer, would have established that appellant did not have the weapon in his possession at the time of the arrest, a circumstance conceded in the Government's subsequent proffer and testified to by Officer Tapscott, the arresting officer. The relevant colloquy is set forth below.[5]

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[5] The full substance of the colloquy concerning the missing witness is included below.

MR. SORREL: The defendant submitted to me the names of two witnesses whom we obtained subpoenas for, and only one of them has ever been served. The other has been served, and that witness is in court. The defendant says that the witness who has not been served can give testimony which pertains to the actual arrest and finding of the weapon. I don't know where that witness is. I don't ask for a continuance, but I do bring it to the attention of the court since I am assigned counsel.

My client does, in fact, want him here, but wanting him here doesn't mean we have been able to find him. The defendant has not been able to find him, although I have requested him to do so.

I felt that I should bring this to the attention of the Court, since this is an assigned case.

THE COURT: What is the proffer of his testimony?

MR. SORREL: At the time the officer came into the men's room at the place of employment of the defendant he, the witness Adams, was supposedly there; and he supposedly can testify that the defendant did not have the gun, a gun in his possession and that the officer walked over to a trash can and pulled the gun from the trash can and alleged that the gun had been in the possession of the defendant at the time the police officer first started pursuit of the defendant.

MR. WEBSTER: I might say for the record, Your Honor, that the Government would proffer at this time its testimony with respect to the recovery of the gun, which is substantially the same as that proffered by Mr. Sorrell here, the testimony of Mr. Adams. The Officer did not see the gun in the hand of the defendant at the time of the recovery. The recovery was made with the defendant next to the trash barrel, with the gun on top of the refuse in the trash barrel.

[Footnote continued on page 19.]

Appellant argues on appeal that by the terms of his proffer of testimony, the missing witness would have testified that appellant did not have in his possession a gun during the entire period the witness was present in the men's room, including a period prior to the arresting officer's entrance. Appellant misconceives the force and meaning of his proffer. Immediately prior to the actual proffer, he told the court:

> "The defendant says that the witness who has not been served can give testimony which *pertains to the actual arrest and finding of the weapon.* I don't know where that witness is and I don't ask for a continuance. . ." (Tr. 3)

Besides minimizing the value of the missing witness' prospective contribution by explicitly not asking for a continuance, appellant laid a clear predicate to the missing witness' testimony, leading both the court and the Government to believe that in point of time it concerned the circumstances of the arrest and the subsequent finding of the weapon.

This predicate was reaffirmed in the actual proffer, which begins "At the time the officer came into the men's room at the place of the defendant, he, the witness Adams, was supposedly there" (Tr. 4). One must add considerably to the proffer to make it admit of the meaning appellant now urges on this Court. The proffer does not state during what period the missing witness was present in the washroom, only that he was there when the officer entered. Surely if this witness was to have testified to a time prior to the entrance of the arresting offi-

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[5] [Continued]

> The officer will not say and cannot that he saw the gun in his hand at the time of arrest.
>
> THE COURT: All right.
>
> MR. SORRELL: The testimony would be consistent, Your Honor.
>
> THE COURT: All right. Under those circumstances, I don't think the defendant would be prejudiced by the absence of the witness. (Tr. 3-5)

cer, this should have been stated in explicit terms. Further, if the missing witness actually preceded appellant into the washroom and would have testified that at no time during appellant's presence in the washroom did he have in his possession a pistol, it is inconceivable that appellant would have failed to state this explicitly in his proffer.

Instead of stating either of the above, however, appellant referred in his proffer continually and solely to evidence to be offered about events *at the time of the arrest and thereafter*. The Government's proffer fit squarely that of appellant. It proffered that neither at the time of appellant's arrest nor at the time of the recovery of the pistol did the arresting officer see the pistol in appellant's possession. Officer Tapscott reaffirmed this in his testimony before the court (Tr. 25, 26).

In view of the consistency of the two proffers and Officer Tapscott's subsequent testimony, the trial court reasonably viewed the testimony of the missing witness, as characterized by appellant, as immaterial, adding nothing to appellant's case and in its discretion proceeded forward with the case. Appellant, represented by competent counsel, raised no objection to the court's initial decision to proceed ahead nor did he again during the entire course of the trial make known any desire to have the missing witness present. Such silence reinforced the trial court's initial view of the meaning of his proffer. Faced with such coinciding proffers and with clear acquiescence in his decision by appellant, it can hardly be called an abuse of discretion for the trial judge not to have granted on his own motion a continuance.

Appellant might have strengthened his position had he attempted to make the sort of showing contemplated by *Neufield*. Instead he made none. Outside of a brief outline of the missing witness' testimony, appellant made no attempt to show that this individual could be obtained if a continuance were granted or that due diligence had been used in attempting to locate him. As the court in *Neufield* aptly noted, . . . "if, under the circumstances set

out, a continuance must be granted, there will be no end to delays in criminal cases." *Neufield, supra* at 179. Appellant's failure in this regard further forecloses his instant challenge of the trial court's discretion in not on its own motion granting a continuance.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT K. WEBSTER,
ARTHUR L. BURNETT,
Assistant United States Attorneys.

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